



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

H.C.CR.A NO. 21 OF 2016

(J.A. MAKAU – J.)

KELVIN OLOO OUMA APPELLANT

VERSES

REPUBLIC RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 9.1.2015 in Criminal Case No. 13 of 2013 of P.M'S Court At Siaya By J.N. SANI (AG. SRM)

JUDGMENT

1. The appellant **KELVIN OLOO OUMA** was charged with an offence of escape from lawful custody contrary to **section 123 of the Penal Code** as read with **Section 36 of the Penal Code**. The particulars of the offence are that on the 29th day of December 2014, at Nyandiwa sub-location, in Siaya County, with another not before court, being in lawful custody of **No.29752 PC Elijah Kosgei** and **No. 33734 PC MICHAEL MUTINDA** at Siaya G.K. Prison cell escaped from the said custody.
2. That when the appellant was arraigned in court for plea he pleaded guilty and upon facts of the offence being given he stated the facts were correct and was accordingly convicted and sentenced to serve three (3) years imprisonment.
3. Aggrieved by sentence the appellant preferred an appeal urging the sentence was harsh and excessive in view of the fact that he pleaded guilty, that he was not given an opportunity to mitigate, that he is the sole breadwinner of a tender family who need care and parental support, that he is an orphan and that his life has been threatened due to long sentence meted against him and that he is now a reformed character.
4. That during the hearing of the appeal the appellant appeared in person and relied on the grounds set out in his grounds of appeal and on his written submissions. The state opposed the appeal urging that the trial court exercised its discretions judiciously however the State Counsel later conceded the sentence was harsh, excessive and unlawful.
5. I have very carefully considered the rival submissions by the appellant and the State Counsel. The issue for consideration is whether the sentence meted against the appellant is harsh, excessive and unjustified?
6. **Section 123 of the Penal Code** provides:

“Any person who, being in lawful custody, escapes from that custody is guilty of a misdemeanour.”

7. The sentencing is under **Section 36 of the Penal Code** which provides:

“When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.”

8. I have perused the trial court's proceedings and indeed as submitted by the appellant the trial court did not give the appellant an opportunity to mitigate before sentencing which was an oversight on part of the trial court and unjustified. The appellant should have been heard on his mitigation before a sentence was meted and that omission prejudiced the appellant. I have very carefully considered that the appellant is a first offender and is a breadwinner of his family, however the offence committed was serious and should not be encouraged. The trial court was however in error in imposing a sentence beyond what is provided for by law for such offence under **Section 36 of the Penal Code**. The sentence of three (3) years was not only excessive and harsh but was unlawful. The trial court erred in imposing a sentence not provided for by law. The learned state counsel was correct in conceding the sentence was unlawful. I agree the sentencing is always at the discretion of the trial magistrate but such discretion must be exercised within the provisions of the law but not at the whims of the judicial officer to impose any sentence that is unjustified and unlawful or against the law and as such the sentence meted against the appellant remains unconstitutional and should be set aside.

9. In view of the conclusion I have come to I uphold the conviction, but set aside the sentence of three (3) years and substitute it with Eighteen (18) months to run from 9th January, 2015. That the Appellant now having served imprisonment of 18 months. I order that he be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 2ND DAY OF JUNE, 2016.

J. A. MAKAU

JUDGE.

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:-

Appellant in person: Present

MR. E. Ombati for State: Present.

Court Clerk: 1. Kevin Odhiambo

2. Mohammed Akide:

J. A. MAKAU

JUDGE